ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter Of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket 92-266
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	CS Docket No.96-60
	)	

REPLY COMMENTS OF
CENTER FOR MEDIA EDUCATION, ALLIANCE FOR COMMUNITY MEDIA, ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS, CONSUMER FEDERATION OF AMERICA, CONSUMER PROJECT ON TECHNOLOGY, MEDIA ACCESS PROJECT, NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, NATIONAL COUNCIL ON LA RAZA, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, PEOPLE FOR THE AMERICAN WAY

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TABLE OF CONTENTS

SUMMARY

In 1984 and again in 1992 Congress recognized that leased access must play a vital role in achieving wide diversity and competition in the video programming marketplace. While CME still believes that the fairest way of achieving those goals is to charge the incremental cost of adding a leased access channels, the Commission's net opportunity cost/market rate formula, with appropriate safeguards, can make leased access a viable option for most programmers.

Given the cable industry's historic and consistent opposition to leased access, it is not altogether surprising that that industry's comments to the Commission's proposal are hostile, inconsistent with the current law and legal precedents and, for the most part, without factual foundation.

In reply to the cable industry, CME submits these comments which make the following points:

1. The requirement proposed by CME that cable operators set aside a portion of the capacity designated for leased access for non-profit programmers is fully consistent with, and indeed, promotes the goals of the First Amendment.

2. To the extent that the constitutionality of a non-profit set-aside needs to be analyzed separately under O'Brien, it is a content-neutral restriction that imposes only an incidental burden on speech, furthers a substantial governmental interest in diversity and competition set forth by Congress in 1984 and 1992, is wholly unrelated to the suppression of free expression, and is no greater than essential to further those interests.

3. Congress in the 1992 Cable Act granted the Commission ample authority to establish a non-profit set-aside to expedite the achievement of the Cable Act's twin goals of diversity and competition.

4. The Cable industry's claims that the opportunity cost/market rate formula would subsidize programmers is based on the faulty factual assumptions that leased access programming has little or no value, that it will primarily consist of home shopping and infomercial programs, and that because there is robust competition in the multichannel video marketplace, cable systems will lose subscribers. In fact, the proposed formula, coupled with a non-profit set-aside will stimulate the market for diverse, independent programming valued by subscribers.

5. Adopting a formula based on the average, rather than lowest non-leased access programming cost will yield a windfall for the cable operator, and is inconsistent with the Cable Act.

6. Finally, CME urges the Commission (1) not to institute a phase-in where bumping would not occur, (2) to reject arguments that first-come, first-serve leasing is contrary to Congressional intent, and (3) to set a compensatory part-time rate by pro-rating the maximum rate with time of day pricing.

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The Center for Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, Consumer Project on Technology, Media Access Project, Office of Communication of the United Church of Christ, National Alliance for Media Arts and Culture, National Association of Artists' Organizations, National Council on La Raza, People for the American Way, and United States Catholic Conference (hereinafter "CME")[1] respectfully submit Reply Comments in the above referenced proceeding.

[1] The reply Commenters represent a large and diverse group of organizations including civic, educational, arts, public interest, cultural, consumer, religious, media, and nonprofit organizations. As described in Appendix A, they also represent a larger community of nonprofit organizations.

In 1984 and again in 1992, Congress recognized that leased access must play a vital role in achieving true diversity and competition in the video programming market. What many industry commenters urge is that the Commission grant them the flexibility to craft whatever leased access policy is most advantageous to them. Given the history of leased access, CME submits that the Commission should adopt leased access rules that equalize the bargaining power between the lessee and the operator, allow lessees to produce and distribute quality programming that would add value to the cable system, and increase the diversity of programming sources in the market. As CME stated in its original comments, we believe that the simplest and most effective way to achieve these goals is to base the leased access rate on the incremental cost of adding a leased access channel; this approach would successfully circumvent the debate about which opportunity costs are sufficiently quantifiable. However, the Commission's proposed net opportunity cost/market rate formula can and will work to the benefit of both leased access programmers and cable operators if the Commission removes the loopholes that would allow the formula to be manipulated, and establishes a non-profit set-aside to safeguard diversity. In order to harness the creative and innovative potential of the more than one-half million non-profit organizations who might seek access to a cable system, these reply comments primarily argue that the Commission can and should establish a non-profit set-aside.

I. Preferential Access for Non-profit Programmers in the Form of a Set-aside is within the Commission's Authority and Promotes First Amendment Goals.

In its original comments, CME proposed that the Commission require cable operators to set aside a portion of the capacity designated for leased access, for non-profit programmers.[2] Several commenters question the constitutionality of that proposal and argue that the Commission has no authority to establish such a set-aside. CME still maintains that a non-profit set-aside is consistent with and furthers the First Amendment goals of free speech and diversity of viewpoints.[3] Further, CME urges the Commission not to adopt rules that would exclude non-profit programmers; rules that by their very application exclude thousands of potential speakers would not comport with the House's intent of assuring the "widest possible diversity of information sources to the public."[4]

A. A Non-profit set-aside promotes the goals of the First Amendment.

TCI and several other commenters argue that the burden the leased access provisions of the Cable Act place on speech are content based, and even if they were content neutral, could not withstand intermediate scrutiny under United States v.

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[2] See Comments of Center for Media Education et al., May 15, 1996, at 16-23 (CME).

[3] See CME, at 20-21.

[4] H.R. REP. NO. 934, 98th CONG., 2d SESS., at 48 (1984) (1984 House Report)(emphasis added).

O'Brien.[5] However, the constitutionality of the Cable Act's access provisions have repeatedly been affirmed and, although the constitutionality of commercial leased access is currently on appeal, in Daniels Cablevision v. United States,[6] the most

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[5] See Comments of Telecommunications, Inc. (TCI), at 40-43 (arguing that leased access requirements do not further a substantial governmental interest); Joint Comments of Cable Television Operators (Joint Commenters), at 17-19 (arguing that the FCC is constitutionally barred from interfering with the free exercise of journalistic judgment).

In addition, several other commenters challenge the constitutionality of the Commission's proposed net opportunity cost/market rate formula. Opposition of USA Networks, at 8 (arguing that the proposed formula fails the "substantial governmental interest" test); Comments of Cable Programming Coalition of A& E Television Networks, The Courtroom Television Network, NBC Cable and Ovation (A&E), at 40-55 (arguing that the government's current leased access proposal does not satisfy the First Amendment).

However, the Commission's proposed leased access formula is essentially a form of rate regulation. Cable rate regulation was found to be constitutional in Time Warner v. FCC, 56 F.3d 151 (1995), cert denied 116 S.Ct. 911 (1996). The Time Warner court, applying intermediate scrutiny under O'Brien stated: " 'Like the must-carry rules in Turner Broadcasting, the cable rate regulations . . .'are not structured in a manner that carries the inherent risk of undermining First Amendment interests." Time Warner v. FCC, 56 F.3d 151, 220 (quoting Turner Broadcasting v. FCC, 114 S.Ct 2445, 2468). The court found that the government had a substantial interest in regulating cable rates to "[protect] consumers from monopoly prices charged by cable operators who do not face effective competition," and are narrowly tailored. Id.

[6] Daniels Cablevision v. United States, 835 F. Supp. 1 (1993), sub nom. Time Warner v. FCC, No. 93-5349 (D.C. Cir. 1993). See also Brief for Appellees at 43-49, Time Warner v. FCC, (D.C. Cir. 1993)(No. 93-5349).

In Daniels the cable operators and programmers challenged the constitutionality of commercial leased access as well as other third-party access provisions of the Cable Act. They argued that the access provisions forced them to speak in ways they would not otherwise choose. As Comcast Cable Communications and TCI argue here, the operators maintained that leased access "interfere[d] with their ability to design the packages of services that they would like to offer their subscribers," and [made] it more difficult for operators to carry the products of certain programmers, [preventing] the programmers from reaching their optimum audience." Daniels, 835 F. Supp., at 6. See also Comments of Comcast Cable Communications, at 6 ("[S]electing and packaging programming is the core activity of the business of cable television." (citation omitted)); TCI, at 13-14 ("The use of program packaging to retain or add subscribers is not only a

recent case to rule on the constitutionality of leased access, and Turner Broadcasting v. FCC,[7] there is little reason to believe that these provisions will not be upheld. Indeed, Commenters raise the same First Amendment arguments that were raised and rejected in Daniels. Under current law, the Commission must presume that the leased access provisions are a constitutional exercise of Congress' power to further its interest

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tool for market development, it is the primary and essential tool.").

The Daniels Court rejected these arguments and held that the commercial access provisions are content-neutral and withstand intermediate scrutiny under O'Brien; specifically the leased access provisions further the government's significant interest in promoting fair competition and ensuring third-party access. The court also found that the "leased access provisions [do not] overreach." Daniels, 835 F. Supp. at 7. Most significant in terms of means-end fit was the fact that the leased access obligations are directly proportional to the number of channels on a cable system. Id.

[7] Turner Broadcasting System v. FCC, 114 S.Ct. 2445 (1994). In Turner, cable system operators and programmers challenged the constitutionality of the must-carry provisions of the Cable Act that require the cable systems to retransmit local broadcast signals. The Supreme Court applied intermediate scrutiny to the provisions and found that they posed little risk of "excising certain ideas or viewpoints from the public dialogue." Id. at 2459.

The court accorded substantial deference to Congress' predictive judgment that the economic health of local broadcasting was at risk and held that the must-carry rules do not burden more speech than necessary to achieve the government's purpose. Id. at 2469, 2471.

Not only does the Turner court address and reject, under much less compelling circumstances, many of the arguments that commenters raise to support their claim that leased access is unconstitutional, but even the dissenters suggest that Congress could require cable operators to set-aside a portion of their channels for third parties without raising the specter of content-based regulation. Id. at 2480 (O'Connor, J., dissenting)("Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or timesharing arrangement.") Judge Williams, who dissented in Turner below agreed. He states: "The [cable operator] may be ordered to serve all parties that meet neutral criteria for service . . . . In fact, in 1984 Congress adopted provision for neutral, compulsory access to cable in s 612 of the Cable Communications Policy Act of 1984.") Turner Broadcasting System, 819 F. Supp. 32, 57 (1993)(Williams, J., dissenting).

in diversity and competition. Therefore, to the extent that Commenters challenge the constitutionality of leased access generally, Daniels is dispositive.

Since cable operators have no editorial control over set-aside channels, it is unclear whether the method of allocating those channels affects their rights. However, to the extent that the constitutionality of a non-profit set-aside needs to be analyzed separately under O'Brien, it is a content-neutral restriction that imposes only an incidental burden on speech, furthers a substantial governmental interest in diversity and competition, is wholly unrelated to the suppression of free expression, and is no greater than essential to further those interests [8]

As an initial matter, a non-profit set-aside is clearly content-neutral. As CME argued in its original comments, a non-profit set-aside is neither related to the "identity" of the speaker, except the generic identity as a non-profit, nor to the content of its message.[9] Rather, a set-aside is a structural regulation based on the tax classification of the programming entity, a factor that does not inform the content of any speech the entity might sponsor. As such, a set-aside for non-profit speakers would neither burden nor benefit speech of any particular content. In 1984, the House noted: "A requirement of reasonable third-party access to cable system will mean a wide diversity

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[8] United States v. O'Brien, 391 U.S. 367, 377) (1968). The Senate report for the 1984 Cable Act expressly states: "The proposed regulations [PEG and leased access] and provisions pass constitutional muster under the standards set out in United States v. O'Brien. The regulations are content-neutral (they are not directed to the content of the speech) and are narrowly-tailored means to further substantial governmental interests." S. REP. NO. 92, 102d CONG., 1st SESS; at 52 (1991) (1991 Senate Report).

[9] CME, at 20.

of information sources for the public--the fundamental goal of the First Amendment--without the need to regulate the content of programming provided over cable."[10]

Similarly, the purpose of the non-profit set-aside is unrelated to content. The purpose of a non-profit set-aside is to promote Congress' legislative vision of a diverse group of unaffiliated programmers gaining access to cable systems. It allows an under represented group of speakers, non-profit entities, access to a distribution outlet, regardless of their message. Without a set-aside, non-profit programmers will not be able to compete with other potential speakers, particularly for-profit entities.[11]

However, even if a non-profit set-aside were found to relate to the content of the program offerings, it is viewpoint-neutral and would still be assessed under intermediate scrutiny.[12] Both the majority and dissent in Turner were most concerned about regulations that favored (or burdened) a particular viewpoint.[13] A non-profit set-aside would make no judgment about whether speech by non-profit entities is more

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[10] H.R. REP, NO. 934, 98th CONG; 2d SESS., at 30 (1984)(1984 House Report).

[11] The set-aside's design and operation only underscores its limited purpose. A non-profit set-aside would neither require nor prohibit the carriage of a particular viewpoint. It also would not encroach on the cable operator's right to carry the programming it wished on the rest of system

[12] Turner, 114 S.Ct., at 2445.

[13] Turner, 114 S.Ct., at 2462 (arguing that the must-carry rules "do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree.")
Id. at 2477 (O'Connor, J., dissenting)(" 'The government may not regulate [speech] based on hostility--or favoritism--towards the underlying message expressed.' " (quoting RAV v St. Paul, 112 S Ct. 2538, 2545 (1992)).

valuable than speech by for-profit entities; it merely reflects that non-commercial speech is at least as valuable as commercial speech Because the ultimate goal is the widest possible diversity of programming sources, and access to cable systems requires a financial wherewithal that the vast majority of non-profit entities do not have, a non-profit set-aside would simply level the playing field.

The adequacy of the legislative record as to the importance of the government's interest in diversity and competition is apparent. In 1984, Congress stated:

> An important concept in assuring that cable systems provide the public with a true diversity of programming sources is leased access. Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems by third parties unaffiliated with the cable operator, and thereby promotes and encourages an increase in the sources of programming available to the public.
>
> A requirement that channels be set aside for third-party commercial access separates editorial control over a limited number of cable channels from the ownership of the cable system itself. Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment.[14]

Again in 1992, Congress made the magnitude of the government's interest in "[promoting] competition in the delivery of diverse sources of video programming" clear by amending Section 612(a) of the Communication Act of 1934 to include this purpose.[15] Congress noted:

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[14] 1984 House Report, at 47, 31.

[15] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, section 9(a) (1992).

> There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.[16]

NCTA challenges the government's interest in diversity and competition on the ground that "Congress' goals in adopting leased access in 1984 have largely been realized."[17] TCI similarly argues that the harm that the Commission's rules aim to remedy is illusory.[18] Congress certainly disagreed in 1992 that diversity had been achieved and, especially in terms of the presence of non-profit programmers on cable systems, little has changed. In fact, in 1995, the Commission indicated that it "[could] not conclude that a competitive market currently exists for the delivery of video programming."[19] Moreover, virtually none of the unaffiliated programmers that TCI appends to its comments as Attachment D are non-profit programmers.

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[16] H.R. CONF. REP. NO. 124, 102d CONG., 2d SESS. 862, at 55-57 (1992).

[17] Comments of the National Cable Television Association (NCTA), at 6. See also TCI, at 7; Comments of Continental Cablevision (Continental), at 33 ("[T]here has been an explosion of video programming available since Section 612 was enacted."); Comments of E! Entertainment (E!), at 6 (noting the "abundance of programming choices" available today).

[18] TCI, at 42.

[19] Annual Assessment of Competition in the Market for Video Programming Services, Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd 2060, 2046 (1995) (hereinafter, "Second Annual Report"). Since 1990, the percentage of programming affiliated with a cable operator has increased from three percent to fifty-three percent. Id. at 2131. Tele-communications, Inc., alone, holds ownership interests in thirty percent of national programming services. Id. at 2132-2133.

Congress' diversity and competition goals cannot be fully achieved if an entire category of potential programmers is excluded. Most non-profit organizations could not afford to compete with for-profit commercial programmers for carriage on any of the ten randomly chosen cable systems that CME surveyed for its original comments.[20] Therefore, NCTA's argument that "diverse programming services. . .continue to pour into the marketplace"[21] misses the point entirely: a large group of programmers is specifically being excluded from that marketplace. That certainly cannot be what Congress intended when it sought to assure the "widest possible diversity of programming sources."

TCI also questions whether the Commission's proposal is narrowly tailored to achieve the governmental interest in diversity, and challenges whether leased access generally and a non-profit set-aside by implication would increase diversity.[22] However, narrow tailoring only requires that "the means chosen do not burden substantially more speech than is necessary to further the

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[20] See Declaration of Anthony E. Wright, Future of Media Project Coordinator, Center for Media Education, at Appendix B.

[21] NCTA, at 7

[22] "What diversity if any, will subscribers gain through commercial leased access. The economics of cable programming suggest that the vast majority of such users will offer home shopping and infomercials." TCI, at 9; "Most leased access requests that we receive are for infomercial programming." TCI, at 10.

government's legitimate interests."[23] A non-profit set-aside burdens no more than would be necessary to achieve the government's interest.

In addition, TCI argues that creating a preference for not-for-profit entities is grossly overbroad and highly unlikely to promote an increase in competition and diversity.[24] NCTA goes further and raises the worthiness and financial need of many of the entities that would receive preferential access under such a classification.[25] However, limiting the preference to those non-profit organizations who qualify for tax exemption under §501(c)(3) of the Internal Revenue Code, as CME suggested in its original comments, directly addresses these Commenters' concerns about overbreadth. Such a classification narrows the class of eligible organizations considerably,[26] without assessing content, but at the same time distinguishes the organizations who need a set-aside most. It is common knowledge that the vast majority of non-profit organizations operate on limited budgets. Of course, a very small number of non-profit organizations

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[23] Turner Broadcasting, 114 S.Ct., at 2469 (quoting Ward, 491 U.S. at 799).

[24] TCI, at 28-29.

[25] Specifically, NCTA states: "A 'not-for-profit' designation is simply too broad a category on which to hang judgment about the worthiness of the entity seeking access or its ability to pay full freight for access." NCTA, at 35.

[26] Of the 1, 426,000 non-profit organizations in the country, 689,000 are reported by the IRS as being §501(c)(3) organizations. Independent Sector, America's Independent Sector in Brief, from the Nonprofit Almanac 1995-1996, Winter 1995. Under §501(c)(3), organizations must be "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or education purposes, or to foster national or international amateur sports competition, or the prevention of cruelty to animals." Clearly, the potential for diverse and public-spirited programming is tremendous.

are financially secure, but the Commission should not base its regulation on the characteristics of the organizations who exist at the margin. Indeed, the large non-profit associations on which TCI bases its overbreadth argument--the American Automobile Association, National Association of Security Dealers, the Klu Klux Klan, and National Rifle Associations--are not tax-exempt non-profit organizations under §501(c)(3).[27] Moreover, a 501(c)(3) standard would also prove easy for the Commission to administer, while advancing the goal of diversity. An independent party, the Internal Revenue Service or the courts, would be responsible for making the critical judgment.[28] More importantly, groups with widely differing viewpoints--the League of Women's Voters, United States Catholic Conference, National Audubon Society, NAACP Legal Defense and Educational Fund, Heritage Foundation, and Sierra Club Foundation--would qualify for and could take advantage of the set-aside.

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[27] Internal Revenue Service, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986 (1994).

[28] In addition to the basic criteria enumerated in §501(c)(3), the Internal Revenue Service and the courts have developed a fairly extensive body of law interpreting and construing the basic criteria enumerated in §501(c)(3). For example, to qualify under the section, an organization must "serve a public rather than private interest," Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1996). Similarly, each of the exempt purposes has been minutely defined: "charitable" includes "advancement of religion," "advancement of education or science," and "promotion of social welfare by [eliminating] prejudice and discrimination, [or defending] human and civil rights secured by law." Treas. Reg. § 1.501(c)(3)-1(d)(2).

Therefore, not only does a non-profit set-aside survive intermediate scrutiny, but it affirmatively advances the public interest in diverse sources of information.

B. The Commission has ample authority to establish a non-profit set-aside.

TCI and NCTA maintain that Section 612 rejects any requirement of preferential treatment[29] and that no other statutory basis exists for the Commission to adopt preferential access provisions for non-profit lessees.[30] As the Commission well knows, in 1992 Congress was forced to overhaul the mechanism it had devised eight years earlier, specifically to grant the Commission the authority to oversee and expedite the achievement of the goals of the Cable Act. The initial mechanism was based on allowing cable operators to set reasonable rates, terms and conditions for leased access. In 1992, acknowledging that cable operators had frustrated leased access, Congress authorized the Commission to "establish reasonable terms and conditions for [commercial] use."[31] Congress only placed two limits on this broad grant of

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[29] TCI Comments, at 28; see also Comments of Cox Communications, Inc. (Cox), at 26.

[30] NCTA, at 35.

[31] Cable TV Consumer Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, sect 9(b)(i) and (ii) (1992). Congress expressly acknowledged the breadth of the Commission's authority: "As with the rate regulation section, the FCC is given broad discretion in establishing the maximum reasonable rate and reasonable terms and conditions. . . .The [Senate Committee on Commerce, Science and Transportation] has already stressed the importance of this provision, and it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers." 1992

authority. It prohibited terms and conditions for commercial use that would "adversely affect the operation, financial condition, or market development of the cable system"[32] as well as any rule that would require cable systems to designate capacity for commercial use in excess of the 10-15 percent reservation that Congress established.[33] Since a non-profit set-aside would overstep neither of these limits, it is clearly within the Commission's discretion as a reasonable means of promoting the Cable Act's goals.

Furthermore, commenters also confuse the distinction between PEG and channels set-aside for commercial use. NCTA and several other commenters argue that preferential access for non-profits is unnecessary since non-profit programmers can and should utilize channels set-aside for PEG access.[34] The Commission should give this argument short shrift.[35] PEG access and leased access are neither synonymous nor interchangeable; Congress would not have created two entry option had they been merely duplicative.[36] Rather, PEG and

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Senate Report, at 79.

[32] Section 612(c)(1).

[33] Section 612(b)(2).

[34] NCTA, at 35-36; Cox Comments, at 29; Comments of ESPN, at 9.

[35] See e.g., CME, at 20-23; Reply Comments of CME, at 16-17 (1993).

[36] Section 612(b)(6) confirms that Congress envisioned PEG access and commercial access as distinct entry options. It states: "any channel capacity which has been designated for public, educational, or governmental use may not be considered as designated under this section for commercial use. . ."

leased access are complementary, but distinct provisions designed to ensure that "sufficient channels are available for commercial program suppliers with program services which compete with existing cable offerings."[37]

More importantly, and as CME argued in its original comments, while leased access is required by statute, PEG is local access and negotiating for PEG channels lies within the discretion of the franchise authority. PEG access is only available on approximately 10 percent of the cable systems currently operating in the United States.[38] Even the communities that do have PEG, often have a limited number of PEG channels; for example, a community may have a governmental, but not a educational channel. Clearly, Congress did not intend that non-profit programmers would be confined to PEG channels. In fact, "commercial use" in the context of commercial leased access is defined as "the provision of video programming, whether or not for profit."[39] NCTA's argument must, therefore, fail under a careful reading of the statute and the most cursory review of PEG's current usage.

II. The Commission's Proposed Rules would not Subsidize Programmers.

NCTA, TCI and several other commenters argue that subsidizing leased access programmers would not only nullify the statutory mandate that leased

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[37] 1984 House Report, at 30.

[38] CME, at 21 and Declaration of Barry R. Forbes, at ¶ 26, Appendix C.

[39] Section 612(b)(5).

access not adversely affect the financial condition of cable systems, but also decrease diversity and impair consumer choice.[40] However, the Commission's formula would not lead to a rate subsidy.[41]

A. Leased Access programming has value and any loss of subscribership is highly speculative.

Although other Commenters spend more time discussing the harms of subsidy without ever satisfactorily explaining why a subsidy would result, NCTA's comments are representative. NCTA argues that the Commission's proposed formula is flawed in two respects: it fails to reflect all the costs of leasing because it does not include an approximation of lost subscriber revenue,[42] and it does not account for the value to the programmer of being placed on a tier.[43]

However, NCTA bases its arguments on three erroneous assumptions. NCTA assumes that (1) leased access programming has little or no value, (2) it will primarily consist of home shopping and infomercial programs, and, (3) because there is robust competition in the multichannel video marketplace, cable systems will lose subscribers. All of these assumptions are flawed.

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[40] TCI, at 3, 6-11; NCTA, at 18; ESPN, at 3 (arguing that creating an artificially low rate will subsidize leased access programmers "at the expense of those already acting as diverse sources of programming.").

[41] See Declaration of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America, at Appendix C

[42] NCTA, at 12

[43] NCTA, at 16-18.

First, the history of leased access programming suggests that much of the programming that would appear on leased channels would be highly valued by the subscriber. As the Denver Area Educational Telecommunications Consortium argues in its reply comments in this proceeding, many subscribers prefer leased access programming over other cable offerings.[44] In 1992, TCI commissioned subscriber preference research on The 90's Channel, a leased programming service that was carried on cable systems operated by TCI for six years and which consisted primarily of documentaries and magazine programs. The survey revealed that subscribers who watched The 90's channel preferred it over Court TV, local news channels, The Cartoon Channel, and E! by substantial margins.[45]

Second, there is no basis to assume that leased access programming, if properly implemented will consist primarily of home-shopping or infomercials. CME agrees that it is economics that drives whatever low quality infomercial and home shopping services may have been pitched to cable systems, but submits that it is also economics that keeps quality leased access programming off the air. Under the current leased access rate structure only the most commercial, profit-conscious programming services can survive hence, home shopping and

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[44] Reply Comments of Denver Area Educational Telecommunications Consortium, Inc., CS Docket NO. 96-60, at 3 (May 31, 1996).

[45] Id.

infomercials--programming with negligible start-up and production costs.[46] Cable operators have little incentive to provide access to programmers who compete with affiliated programming, regardless of the quality and in spite of the subscriber appeal of the program. We strongly disagree, therefore, that "leased access will rarely, if ever, work in favor of the small, independent programmer."[47] "The connection between the unrealized potential of leased access programming and the current high rate structure is obvious: The more expensive the access to cable time, the greater the need to generate revenue from advertising and promotional messages during the program " [48]

However, the Commission's proposed formula, coupled with a non-profit set-aside, will stimulate the market for diverse, independent programming--a market that was artificially suppressed by exorbitant rates and unattractive lease terms and conditions. Programs such as a Spanish version of MTV, a highly acclaimed film-style dramatic production, winter sports, local news, sports and business, local fashion, video vacations, real estate, travel, high school sports,

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[46] John K. Waters, "500 Channels and Nothing on Leased Access," 2 Leased Access Report, 1, at 5 (January 1995). A close look at leased access use under the highest implicit fee formula reveals: "the current rates make it all but impossible for leased access programmers to make money on anything but infomercials, home shopping shows or commercial-heavy productions with compromised content." Id.

[47] NCTA, at 5.

[48] Waters, supra note 39.

local candidate forums, and "man-in-the-street" interviews and features[49] are representative of the kind of programming that would flourish.[50] Mike Conway, a video producer in the Lake Tahoe/Reno area notes: "We're not just putting on infomercials about the latest soda can crusher machine. We're providing quality alternative programming that the cable operators are happy to give to their subscribers free of charge. And we're paying them to do it."[51]

Congress made it clear in 1984, that "a price . . .that has the result of deterring all use of designated channel capacity when there are in fact parties seeking access may provide a basis for determining whether the cable operator is acting unreasonably" and labeled that situation an "easily discernable" case.[52] Lawmakers further indicated that they expected "cable operators to charge rates

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[49] These leased access programming ideas are currently being distributed on cable systems or the potential programmers have filed complaints with the FCC in order to procure carriage. See "FCC Leased Access Complaints: Part Two," 2 Leased Access Report 6, at 5 (June 1995).

For example, Terry Wido, a programmer who currently fights to continue to lease a 24-hour channel in a farming community west of Chicago, on Jones Intercable, produced a "man-in-the-street" feature about the Oklahoma bombing. In addition, it is clear that Jones Intercable is not carrying this lessee: "Practically everybody agrees that [Wido's] got an audience. Random calls to ask viewers about [another channel] turned up people who. . .also catch [Wido's shows]. Old movies and there's something on Saturday afternoon about fish, one woman said." Terry Wido and Jeff Nix Build TV53, Leased Access Report, vol 2, no. 6 at 7,8 (June 1995).

[50] See Appendix D for a discussion of the innovative and high-quality leased access programming that local, regional, and national nonprofit organizations could introduce to the marketplace if the leased access rates and terms were reasonable.

[51] Wilderness Productions and the Cable System, Leased Access Report, vol 1, no. 11, at 6.

[52] 1984 House Report, at 51.

which are reasonably fashionable to encourage, and not discourage, use of channels set-aside.[53] Finally, CME notes that there are more rational ways to deal with the diversity concern raised by the possibility of migration or massive influx of home shopping and informercial programming, than the abandonment of leased access approach, endorsed by NCTA and TCI. A non-profit set-aside and ban on migration, for example, would help create a content-neutral preserve where diverse programming could flourish.

Third, commenters argue that because cable systems now face substantial competition from other video delivery services like DBS and MMDS, disgruntled subscribers will easily be able to cancel their cable subscriptions and utilize one of these alternative services. However, the ideally competitive market that these commenters envision does not yet exist; cable operators still retain a stranglehold on the multi-channel video programming market. In its 1995 Assessment of Competition in the Market for Video Programming Services, the Commission concluded that "lack of intense competition in most video distribution markets means that further improvements in consumer welfare remain unrealized."[54] Despite the presence of DBS and MMDS services, the combined national market share of non-cable multi-channel video programming providers was less than nine percent, as of September 1995.[55]

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[53] Id.

[54] Second Annual Report, at 2142

[55] Id. at 2124.

Because leased access programming can be competitive and will be valued by cable subscribers, the loss of subscribership that NCTA forecasts is highly implausible. What really seems to drive NCTA's opposition is the assumption that a low rate automatically equals a subsidized rate and that any rate formula that would increase demand for leased access will harm the operator, programmer,[56] and consumer. NCTA includes a laundry list of potential harms,[57] most of which hinge on the three erroneous assumptions discussed above. Although CME has always maintained that leased access programming adds value to the system and where cable operators have been forced to lease channels to independent programmers value has been added, CME nonetheless believes that under a cost-based formula, the Commission need not facially exclude opportunity costs based on lost subscribership. Rather, the Commission could place the burden on the cable operator to show loss of subscribership actually attributable to the addition of a particular leased

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[56] NCTA argues that programmers will be harmed as a result of lower rates and increased leased access demand. Specifically, NCTA believes that the proposed formula does not contemplate the effect of forcing programmers who remain on the system to be associated with what may to subscribers be undesirable programming. NCTA , at 15, 16. CME believes that the same faulty assumption about the value of leased access programming to subscribers underlies these arguments about how the formula will affect the programmer and ultimately affect the operator. If that premise is discounted as highly unlikely, then NCTA's arguments fall apart.

[57] NCTA claims that as a result of lost subscribership, the system's advertising revenues and commissions will also decrease. Customers, even if they do not abandon their cable subscription, may not be willing to pay the same price and will be so dissatisfied with the programming offering that the system will have to absorb tangible and recurring costs like increased traffic to its customer service department. NCTA, at 13-15.